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Agus bin Agil v Public Prosecutor

A

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–7 OF 2006
JAMES FOONG, HASAN LAH AND SULONG MATJERAIE JJCA
27 MAY 2009

B

Criminal Law — Dangerous Drugs Act — s 37(d) — Statutory presumption — Whether presumption of possession under s 37(d) of the Dangerous Drugs Act 1952 could be used in invoking presumption of trafficking under s 37(da) which came into force four months after appellant committed trafficking offence — Dangerous Drugs Act 1952 s 37(d) & (da)

C

D

Criminal Law — Dangerous Drugs Act — s 37(da) — Trafficking — Presumption — Whether trial judge erred in law by using presumption of possession under s 37(d) of the Dangerous Drugs Act 1952 to invoke presumption of trafficking under s 37(da) — Whether appellant's claim that drugs was for personal consumption good defence against trafficking — Whether exclusivity of custody of dangerous drugs proven — Whether chemist conducted pure standard methamphetamine analysis satisfactorily — Dangerous Drugs Act 1952 s 37(d) & (da)

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F

The appellant, an Indonesian, on 16 May 1998 was detained at Subang International Airport with two black plastic packages containing crystalline substance hidden in the pants worn by the appellant. A chemist confirmed the packages contained 298.3g of methamphetamine. The learned trial judge found that since the presumption of trafficking under s 37(da) of the Dangerous Drugs Act 1952 ('the Act') was not available at the time of commission of trafficking drugs by the appellant, prima facie evidence of trafficking was based on s 2 of the Act and on the authority of *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64. The quantity of the drugs involved was more than minimum amount of 50g stipulated in s 37(da) of the Act and attracted the inference that they were not intended for personal consumption. The learned trial judge surmised that despite the appellant's defence that the drug was for his own consumption, the prosecution has proved the drug trafficking case against the appellant beyond reasonable doubt upon considering the evidence of a forensic pathologist stating that the appellant was not a drug dependent and the appellant's inconsistent and contradictory evidence affected his credibility. The appellant argued that the learned trial judge had misdirected himself when (i) he found that there was a prima facie case for trafficking when his act were of keeping or concealing or carrying dangerous drugs as stated in s 2 of the Act; (ii) the amount of 50g statutory

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amount cannot be used as a guide to draw an inference of trafficking (iii) he made an inference of knowledge and also a further inference of trafficking based on the amount of the drugs. The appellant also averred that the drug analysis carried out by the chemist was flawed as the chemist did not ascertain the pure standard methamphetamine used in the analysis to determine the pureness of the drug.

Held, dismissing the appeal:

(1) Based on the evidence adduced by the prosecution and the finding of the learned trial judge it could be inferred that the appellant had knowledge of the drugs in his possession in view of the manner in which the appellant hid the two packages of drugs underneath his pants. The evidence adduced by the prosecution did not show the value of the said drugs or how many people could consume that quantity of methamphetamine so as to show that the quantity of the drug found in the respondent's possession was large. Nevertheless, when s 37(da) of the Act was amended later by the Dangerous Drugs (Amendment) Act 1998 (Act A1025) which came into force from 15 September 1998, which was four months after the commission of the offence, a presumption of trafficking was included in respect of 50g or more in weight of methamphetamine. The weight of the drug involved was more than five times of the minimum weight of 50g, far in excess of what the appellant would require for his personal use, if any. Hence, the irresistible inference that could be drawn was that the appellant was carrying the said drugs for the purpose of trafficking it. The learned trial judge was right in his finding that a prima facie case had been made out against the appellant (see paras 13 & 20).

(2) The appellant did not adduce any medical evidence to show that he had a history of drug addiction or background. There was no evidence to show that the appellant was suffering from drug withdrawal while he was in the custody. The learned trial judge, after having carefully considered all the evidence, rejected the appellant's defence of personal consumption. The learned trial judge's finding of fact on this issue was justified and his conclusion that the defence had not raised a reasonable doubt was not wrong. Under the circumstances it is found no merit in the appellant's argument on this issue (see paras 26 & 27).

(3) There was no basis for the appellant to complain on the analysis carried out by the chemist on the said drugs and his conclusion on the said analysis. The pure standard methamphetamine used by the chemist was prepared by the Jabatan Kimia Malaysia and not from the supplier. Hence, the chemist has satisfactorily followed the proper procedures in analysing the said drugs (see para 29).

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[Bahasa Malaysia summary

Perayu, seorang warganegara Indonesia, pada 16 Mei 1998 telah ditahan di Lapangan Terbang Antarabangsa Subang bersama dua bungkusan plastik hitam yang mengandungi bahan kristal yang disorok dalam seluar yang dipakai olehnya. Ahli kimia telah mengesahkan bungkusan itu mengandungi 298.3g methamphetamine. Hakim perbicaraan yang bijaksana mendapati bahawa oleh kerana anggapan pengedaran di bawah s 37(da) Akta Dadah Berbahaya 1952 ('Akta tersebut') tidak wujud pada masa pengedaran dadah itu dilakukan oleh perayu, keterangan prima facie pengedaran adalah berdasarkan s 2 Akta tersebut dan autoriti kes *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64. Jumlah dadah yang terlibat melebihi jumlah minimum 50g yang ditetapkan dalam s 37(da) Akta tersebut dan memberi inferens bahawa ia bukan bertujuan untuk kegunaan peribadi. Hakim bicara yang bijaksana menyatakan bahawa meskipun pembelaan perayu mengatakan dadah itu untuk kegunaan sendiri, pihak pendakwaan telah membuktikan kes pengedaran dadah terhadap perayu melampaui keraguan munasabah dengan mengambil kira keterangan ahli patologi forensik yang mengatakan bahawa perayu bukan penagih dadah dan keterangan perayu yang tidak konsisten dan bercanggah telah menjejaskan kebolehpercayaannya. Perayu berhujah bahawa hakim bicara yang bijaksana telah tersalah arah apabila: (i) beliau mendapati bahawa terdapat kes prima facie pengedaran berdasarkan perlakuannya menyimpan atau menyembunyi atau membawa dadah berbahaya sebagaimana dinyatakan dalam s 2 Akta tersebut; (ii) jumlah statutori 50g tidak boleh digunakan sebagai panduan untuk membuat inferens pengedaran; (iii) beliau telah membuat inferens pengetahuan dan juga selanjutnya inferens pengedaran berdasarkan jumlah dadah tersebut. Perayu juga menegaskan bahawa analisis dadah yang dilakukan oleh ahli kimia tidak betul kerana ahli kimia tidak menentukan piawai ketulenan methamphetamine yang digunakan dalam analisi untuk menentukan ketulenan dadah itu.

Diputuskan, menolak rayuan:

(1) Berdasarkan keterangan yang dikemukakan oleh pendakwaan dan penemuan hakim bicara yang bijaksana inferens boleh dibuat yang perayu mempunyai pengetahuan tentang dadah dalam milikannya berdasarkan cara perayu menyembunyikan dua bungkusan dadah di dalam seluarnya itu. Keterangan yang dikemukakan oleh pendakwaan tidak menunjukkan nilai dadah tersebut atau berapa ramai orang boleh menggunakan kuantiti methamphetamine itu untuk menunjukkan bahawa kuantiti dadah yang dijumpai dalam milikan responden adalah banyak. Namun begitu, apabila s 37(da) Akta tersebut telah dipinda oleh Akta Penagih Dadah (Pindaan) 1998 (Akta A1025) yang mula berkuat kuasa dari 15 September 1998, iaitu empat bulan selepas kesalahan itu dilakukan, anggapan pengedaran dimasukkan berkaitan berat 50g atau lebih dadah methamphetamine itu. Berat dadah yang terlibat lebih lima

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kali daripada berat minimum 50g, melebihi apa yang perayu perlu untuk kegunaan peribadinya, jika ada. Justeru itu, inferens yang tidak dipertikaikan boleh dibuat bahawa perayu membawa dadah tersebut bagi tujuan mengedarnya. Hakim bicara yang bijaksana adalah betul dalam penemuan beliau bahawa kes prima facie telah dibuat terhadap perayu (lihat perenggan 13 & 20).

(2) Perayu tidak mengemukakan apa-apa keterangan perubatan untuk menunjukkan bahawa dia mempunyai sejarah penagihan dadah atau latar belakang. Tiada keterangan menunjukkan bahawa perayu mengalami ketagihan dadah semasa dia dalam tahanan. Hakim bicara yang bijaksana, setelah mempertimbangkan dengan berhati-hati semua keterangan, telah menolak pembelaan perayu tentang dadah untuk kegunaan sendiri. Penemuan hakim bicara yang bijaksana berhubung isu ini dijustifikasikan dan kesimpulan beliau bahawa pihak pembelaan tidak menimbulkan keraguan munasabah adalah tidak salah. Dalam keadaan berikut hujah perayu berhubung isu ini adalah tidak bermerit (lihat perenggan 26 & 27).

(3) Perayu tiada asas untuk mengadu tentang analisis yang dilakukan oleh ahli kimia ke atas dadah tersebut dan kesimpulannya tentang analisis itu. Piawai ketulenan methamphetamine digunakan oleh ahli kimia disediakan oleh Jabatan Kimia Malaysia dan bukan daripada pembekal. Justeru itu, ahli kimia telah mematuhi prosedur sewajarnya dalam menganalisa dadah tersebut (lihat perenggan 29).]

Notes:

For cases on statutory persumption, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 187–190.

For cases on s 37(da) of the Dangerous Drugs Act, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 341–353.

Cases referred to

Alcontara a/l Ambross Anthony v Public Prosecutor [1996] 1 MLJ 209, FC (refd)
Chow Kok Keong v Public Prosecutor [1998] 2 MLJ 337, FC (refd)
Cohen Lorraine Philis & Anor v Public Prosecutor and another appeal [1989] 3 MLJ 289, SC (distd)
Mohamad Yazri bin Minhat v Public Prosecutor [2003] 2 MLJ 241 (refd)
Ng Chai Kem lwn Pendakwa Raya [1994] 2 MLJ 210, SC (distd)
Ong Ah Chuan v Public Prosecutor [1981] 1 MLJ 64, PC (refd)
Parlan bin Dadeh v Public Prosecutor [2008] 6 MLJ 19, FC (refd)
Public Prosecutor v Karim bin AB Jabar [2008] 3 MLJ 685, CA (refd)
Teh Hock Leong v Public Prosecutor MRRJ No B-05–84 of 2003, (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37(da), 37A(1)(b), 39A, 39B(2)

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Appeal from: Criminal Trial Nos 47–9 of 2000 and 47–17 of 2000 (High Court, Shah Alam)

T Vijayandran (T Vijay & Co) for the appellant.
Nurulhuda Nuraini bt Mohd Noor (Deputy Public Prosecutor, Attorney General's chamber) for the respondent.

Hasan Lah JCA:

[1] The appellant ('accused') was convicted of the offence of trafficking contrary to s 39B(2) of the Dangerous Drugs Act 1952 ('the Act'). He has appealed against the conviction and sentence.

[2] We heard this appeal on 13 December 2008 and unanimously dismissed it. We now give the grounds of our decision.

[3] The facts relevant to this appeal are as follows. The appellant is an Indonesian who came to Malaysia on 14 May 1998 for a short visit. He wanted to go back to Indonesia on 16 May 1998. At the Subang International Airport at about 6.20pm PW4 (Cpl Joseph Bartram ak Brain), a security assistant on duty at Gate 6, Terminal 1 of the Subang Airport, conducted a body search on the appellant. PW4 suspected that something was hidden on both part of the thigh underneath the pants worn by the appellant. On PW4's instruction, the appellant took out from underneath his pants two black plastic packages containing crystalline substance which was later confirmed by the chemist to contain 298.3g of methamphetamine. The appellant told PW4 that the substance was 'ubat-ubatan' and when PW4 asked him for the sale receipt the appellant told him that it was 'ubat-ubat China'.

[4] PW4 proceeded to seize the appellant's international passport, boarding pass and air ticket and escorted him to the airport police station where the appellant was handed over to SP6 (Sjn Jagdev Singh a/l Saran Singh) at about 8.20 pm SP6 then rearrested the appellant and later the appellant was sent to Damansara Police Station.

[5] At the close of the case for the prosecution the learned trial judge held that the prosecution has proved a prima facie case against the appellant. From his judgment it is clear that the learned trial judge found that the appellant was in actual possession of the said drug. With regard to trafficking the learned trial judge held that since the presumption of trafficking under s 37(da) of the Act was not available at the time of the commission of the offence, prima facie evidence of trafficking was based on s 2 of the Act and on the authority of *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64. The quantity of the drugs

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involved was more than the minimum amount of 50g stipulated in s 37(da) and as a matter of common sense attracted the inference that they were not intended for personal consumption.

[6] In his defence the appellant chose to give sworn testimony. In his testimony the appellant said that:

(a) While he was in Malaysia on holiday, he met a Chinese man, Henry, who offered to sell him the substance for RM350. He had tested the substance by burning it on an aluminium foil and inhaled its smoke. He recognised the substance as he had been using it for the previous four to five years in Indonesia. He said that he also consumed it by mixing it in water and drink it. He used it every day and felt uncomfortable if he did not use it. The said drug was for his personal consumption only and not for trafficking.

(b) Three days after his arrest ie on the 19 May 1998 the police had recorded a statement from the appellant under s 37A(1)(b) of the Act where he has stated that the drug was for his own consumption. During his testimony the appellant had tendered the statement and it was marked as exh D3.

[7] He called DW2 (Dr Om Prakash Murty), a forensic pathologist working as an Associate Professor in the University of Malaya, who is familiar with methamphetamine, as his witness. In his evidence DW2 said:

(a) The drug is a central nervous system drug and the person feels high after using it. The drug is consumed orally, intravenously, snorting and smoking and it can be taken with water, with or without food. It is smoked by putting the substance on an aluminium foil and burning it below the foil and inhaling the smoke.

(b) Usually people take it three times a day, the total amount for the day is 5–15g and the effect remains for four to six hours. A physical examination by an expert or chemical analysis in blood and urine will show that the person is a drug abuser.

(c) This is an addictive drug and the withdrawal symptoms are mainly agitation, body pains, running nose.

(d) Methamphetamine is a well known abused drug used in parties and dancing cabaret.

[8] The learned trial judge did not believe the appellant's defence that the said drug was for his own consumption. According to him it was a mere concoction by the appellant. The learned trial judge also ruled that the defence has not raised any reasonable doubt in the prosecution case and that the

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prosecution has proved its case against the appellant beyond reasonable doubt. The appellant was convicted of the offence and sentenced to death under s 39B(2) of the Act.

[9] In his judgment the learned trial judge gave the following reasons for not believing the appellant's defence:

(a) DW2's evidence did not show that the appellant was a drug dependent or that the appellant was addicted to methamphetamine. DW2 merely gave his expert opinion of methamphetamine and its effect on its users.

(b) There were inconsistencies and contradictions in the appellant's evidence and that affected his credibility.

[10] In the hearing of this appeal before us learned counsel for the appellant raised three main issues. The first issue was that the learned trial judge misdirected himself when he made a finding that the prosecution has made out a prima facie case of trafficking against the appellant. It was his contention that the mere act of 'keeping', or 'concealing' or 'carrying' dangerous drugs as emunerated in s 2 of the Act would not constitute trafficking. According to him the 50g statutory amount cannot be used as a guide to draw an inference of trafficking. The learned trial judge was also wrong in making an inference of knowledge and also a further inference of trafficking based on the amount of the drugs.

[11] As stated earlier, the learned trial judge made a finding that the appellant was in actual possession of the said drugs. On the issue of knowledge the learned trial judge said:

> Dalam kes ini inferens mengenai pengetahuan tertuduh terhadap dadah tersebut dapat dibuat dari perbuatan tertuduh yang sengaja menyembunyikan bungkusan tersebut di dalam seluarnya. Tindakan ini tidak konsisten dengan kelakuan seseorang yang tidak bersalah. Ia tidak perlu bersusah payah menyembunyikannya jika ia adalah ubat yang tidak menyalahi undang-undang.

[12] In the instant case the two packages of drugs were hidden underneath the appellant's pants. In this regard Gopal Sri Ram JCA, in *Teh Hock Leong v Public Prosecutor* MRRJ No B-05–84 of 2003, made the following observation:

> 8 Turning to the facts of the present instance, we agree with the learned trial judge that the method employed to bring the drugs in question from Thailand into Malaysia was done in a most cunning fashion to escape detection by the authorities. The method employed to convey or transport a drug may sometimes furnish evidence of knowledge. For example, an attempt to carefully conceal a drug may indicate an intention to avoid detection and thereby point to knowledge. Of course it all depends on the facts of each individual case.

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In *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19, Augustine Paul FCJ said at p 45:

> Be that as it may, the evidence of conduct in this case is not very significant in view of the manner in which the appellant carried the drugs on his person from which it can reasonably be inferred that he had knowledge of the drugs in his possession (see the cases referred to earlier, and, in particular, *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259 and *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1).

[13] Based on the evidence adduced by the prosecution we agreed with the finding of the learned trial judge that it could be inferred that the appellant had knowledge of the drugs in his possession in view of the manner in which the appellant carried the drugs on his person.

[14] It was the contention of the appellant's counsel that what the prosecution had proved in the instant case was that the appellant was merely carrying, keeping and concealing the said drugs. That act according to the appellant's counsel is not sufficient to constitute trafficking as the trafficking presumption under s 37(da) of the Act was not applicable to the appellant at that time. In support of that he cited the following cases:

(a) *Public Prosecutor v Nik Ahmad Aman bin Nik Mansor* [2002] 5 MLJ 641;

(b) *Public Prosecutor v Hairuldin bin Zainal Abidin* [2001] 6 CLJ 480;

(c) *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64; and

(d) *Public Prosecutor v Mohd Farid bin Mohd Sukis & Anor* [2002] 3 MLJ 401.

[15] It must be noted that at the date of the commission of the offence methamphetamine was not included in para (da) of s 37 of the Act which provides for presumption of trafficking in certain dangerous drugs. As such the prosecution could not use the presumption of trafficking in s 37(da) of the Act to prove its case against the appellant. The prosecution therefore had to prove by evidence that the appellant was trafficking in the said drugs.

[16] Learned counsel for the appellant submitted that in the instant case the prosecution did not lead evidence to show that the quantity of the involved drugs was large. There was no evidence to show what was the quantity of the drug consumed by an average addict or the value of the said drugs.

[17] It is trite law that mere keeping, concealing or carrying of the drugs is not sufficient to constitute trafficking. However, in *Ong Ah Chuan*'s case Lord Diplock also said at p 69 that:

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> Proof of the purpose of which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminal courts are very familiar. Generally, in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus, in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the purpose of trafficking in them would in the absence of any plausible explanation by him, be irresistible — even if there were no statutory presumption such as is contained in s 15 of the Drugs Act.
>
> As a matter of common sense the larger the quantity of drugs involved the stronger the inference that they were not intended for the personal consumption of the person carrying them, and the more convincing the evidence needed to rebut it.

[18] In *Public Prosecutor v Karim bin AB Jabar* [2008] 3 MLJ 685, 10.384 kg of cannabis was recovered from the car driven the respondent. Gopal Sri Ram JCA, after referring to the passage above from *Ong Ah Chuan*'s case said at p 690 that:

> [8] In the present appeal the respondent was found conveying the proscribed drugs in the motorcar in question. The quantity of the drugs discovered was far in excess of that he would require for his personal use, if any. The irresistible inference that the learned trial judge ought to have drawn from the totality of evidence was that the respondent was conveying the drugs for the purpose of trafficking in it. Unfortunately, the learned trial judge in the court below did not direct his mind along these lines.

[19] In *Mohamad Yazri bin Minhat v Public Prosecutor* [2003] 2 MLJ 241, the appellant was transporting 133kg of cannabis in a car. The High Court judge convicted him of the offence of trafficking. On appeal this court, through Gopal Sri Ram JCA, said at p 250:

> Applying the common sense approach laid down by Lord Diplock in *Ong Ah Chuan*, the learned judge's conclusion that the appellant was guilty of trafficking is abundantly justified.
>
> This is how the learned judge put it at p 24 of his judgment:
>
> > I find the story and the defence of the accused has not raised any reasonable doubt on the prosecution case that he was in exlusive control and custody of the cannabis in the car at about 4.30pm on 17 January 1997 and that he was aware of the nature of the cannabis in the car — that he was in possession of the cannabis — and that he transported the cannabis in the car from outside Kg Chubadak Dalam to Kg Chubadak Dalam, Sentul Pasar. I find him guilty on the charge save that the date and time of the offence is amended to read as occurring on 17 January 1997 at about 4.30pm. And I convict the accused on the charge.

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A We find counsel's attack on this finding by the learned judge to be without merit. It is plain and obvious from a reading of the judgment as a whole that the learned judge had the large quantity of drugs here in the forefront of his mind. The several passages in his judgment reflect the learned judge's satisfaction that the appellant could not have had such a large quantity of drugs in his possession, custody and control save, for the B purpose of trafficking it to others known or unknown. That explains the transporting by the appellant of the drug in the car in which it was found. For that reason we must with respect reject the arguments advanced to us by learned counsel for the appellant.

C **[20]** It is true as submitted by learned counsel for the respondent that no evidence was adduced by the prosecution to show the value of the said drugs or how many people could consume that quantity of methamphetamine so as to show that the quantity of the drug found in the respondent's possession was large. However when s 37(da) was amended later by the Dangerous Drugs D (Amendment) Act 1998 (Act A1025) and came into force from 15 September 1998, which was four months after the commission of the offence, a presumption of trafficking was included in respect of 50g or more in weight of methamphetamine. It is to be observed that the weight of the drug involved was more than five times of the minimum weight of 50g and in our view it was E therefore far in excess of what he would normally require for his personal use, if any. As such, the irresistible inference that could be drawn was that the appellant was carrying the said drugs for the purpose of trafficking it. We are therefore of the view that the learned trial judge was right in his finding that a prima facie case had been made out against the appellant.

F **[21]** The next ground of appeal is related to the rejection of the appellant's defence of personal consumption. Learned counsel for the appellant submitted that the learned trial judge misdirected himself when he rejected the appellant's defence of personal consumption on the basis that it was a recent invention and G therefore unbelievable. The learned trial judge also observed that there was no evidence of injection mark on the appellant's body and also there was no medical evidence to show that the appellant was a drug dependent to support the defence of personal consumption. It is the contention of the appellant that the learned trial judge erred for the following reasons:

H (a) The appellant had stated in his evidence that he consumed the drug by burning it in an aluminium foil and inhaled the smoke and not by injection. DW2 had confirmed that that was one of the ways methamphetamine was consumed.

I (b) The learned trial judge failed to appreciated the fact that the appellant had stated in his cautioned statement that he was a drug user and as such the onus was on the prosecution to disprove the appellant's version of the facts. It is his contention that on this ground alone the appellant's conviction should be quashed. In support of that he cited the Federal

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Court judgment in *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209 and the case of *Chow Kok Keong v Public Prosecutor* [1998] 2 MLJ 337.

[22] In response to that the learned deputy public prosecutor submitted that although it was disclosed in the appellant's cautioned statement that the drugs were for his personal consumption that exculpatory statement from the appellant cannot be used as the basis for his acquittal at the close of the prosecution's case. In addition to that the defence did not cross-examine the investigating officer on the condition of the appellant while he was under detention to show that the appellant was a drug addict. As such the prosecution could not adduce evidence during the case for the prosecution to rebut his allegation that he was depending on the said drugs.

[23] With regard to DW2's evidence the learned deputy public prosecutor submitted that DW2 did not personally examine or see the appellant and DW2 did not say whether the appellant was a drug dependant or having symptoms related to drug addiction. The learned deputy public prosecutor further submitted that the facts in the instant case are distinguishable from the facts in *Cohen Lorraine Philis & Anor v Public Prosecutor and another appeal* [1989] 3 MLJ 289 and *Ng Chai Kem lwn Pendakwa Raya* [1994] 2 MLJ 210 where the defence of personal consumption was accepted by the court.

[24] In *Cohen*'s case Cohen Lorraine Philis and her son Cohen Aaron Shelton were charged for trafficking in dangerous drugs. The learned trial judge convicted Cohen Lorraine Philis on the charge and she was sentenced to death. He found Cohen Aaron Shelton guilty of the amended reduced charge under s 39A of the Dangerous Drugs Act 1952 and sentenced him to life imprisonment and six strokes of the rotan. On appeal Cohen Lorraine Philis argued, inter alia, that she was an addict and not a trafficker. The public prosecutor also appealed in respect of the conviction and sentence on Cohen Aaron Shelton and it was argued that the defence of personal addiction is not available to a person accused of the offence of trafficking.

In their defence they read their written statements from the dock. Both stated they were drug addicts and that the drugs were for their own consumption. Cohen Lorraine Philis stated that at the time of her arrest she needed 4–8g per day of heroin. Medical evidence was also adduced to support her defence. The medical evidence were from one Dr Frazer Mc Donald, a psychiatrist attached to the Carrington Hospital, Auckland, New Zealand who recognized Cohen Lorraine Philis as a patient at a drug clinic in Auckland. According to Dr Frazer Cohen Lorraine Philis was heavily addicted. Medical evidence were also obtained from one Dr Stella Yvette Dalton whose experience included acting as consultant psychiatrist in the heroin maintenance clinics in London hospitals. Dr Stella met Cohen Lorraine Philis for the first time in 1970 for treatment for

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drug addiction. She testified that Cohen Lorraine Philis had been treated for drug addiction between 1970 and early 1981. She also stated that she saw her again in 1984, four times in all and found that she was still a chronic addict and not properly treated.

As regards Cohen Aaron Shelton he admitted that he began smoking heroin at the age of 15 years. According to him when he came to Penang in December 1984 he began to use heroin regularly and his addiction grew because heroin was cheap and readily available in Penang and his daily use increased accordingly. Within 48 hours of his arrest he began to suffer withdrawal from heroin and was taken to the Penang General Hospital. The medical officer attached to Penang General Hospital corroborated the statement of Cohen Aaron Shelton that he was admitted to General Hospital after he complained of fever. The diagnosis was drug withdrawal.

[25] The Supreme Court quashed the death sentence against Cohen Lorraine Philis and substituted a life sentence. In respect of Cohen Aaron Shelton the appeal by the public prosecutor against his conviction and sentence on the reduced charge was dismissed. The Supreme Court held, inter alia, that the defence of personal consumption was available to a person accused of trafficking in dangerous drugs under the Act but whether it would succeed would depend on the facts of the case. At p 291 of that case Abdul Hamid LP said:

> We would however immediately add that we do indeed appreciate that the quantity of heroin found on the person of Cohen Lorraine Philis was not inconsiderable but we have substituted a conviction for possession under s 39A of the Act only in the wholly exceptional circumstances of this case for the reasons we have given in respect of the learned judge's consideration of the matter and in the light of the appellant's sordid history of addiction and background borne out by the medical evidence adduced. We would therefore like to make it very clear that our decision here rests wholly on the particular circumstances of this particular case and must not be taken as a licence for the general contention of personal consumption irrespective of the quantity of drugs involved.

[26] In the present case the appellant did not adduce any medical evidence to show that he had a sordid history of drug addiction or background. There was also no evidence to show that he was suffering from drug withdrawal while he was in the custody. What the learned trial judge had before him was the appellant's own evidence which he said that he had been taking methamphetamine four or five years before the arrest in Indonesia. He consumed the drug by burning it in an aluminium foil and inhaled the smoke and not by injection. His witness, DW2, who was a forensic pathologist had confirmed that that was one of the ways the drug was consumed. As rightly pointed out by the learned deputy public prosecutor there was no other evidence to support the appellant's defence that he was a drug addict unlike

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what was done by the defence in *Cohen*'s case. DW2 never met the appellant and he would not know whether the appellant was a drug addict.

[27] The learned trial judge, after having carefully considered all the evidence on this issue, rejected the appellant's defence of personal consumption. That was his finding of fact. Based on the evidence available and the observation made by the Abdul Hamid LP in *Cohen*'s case in the passage referred to earlier we are of the view that the learned trial judge's finding of fact on this issue was justified and his conclusion that the defence had not raised a reasonable doubt was not wrong. Under the circumstances we found no merit in the appellant's argument on this issue.

[28] The final ground raised by the appellant before us was that the analysis of the said drugs carried out by the chemist ('PW5') was flawed for the reason that PW5 did not carry out test on the pure standard Methamphetamine used in the analysis to determine whether pure standard methamphetamine was indeed pure. In his evidence PW5 agreed that if the standard Methamphetamine used was not pure the result in the analysis would be affected. In cross-examination PW5 stated that the pure standard methamphetamine used was certified by the supplier, Mc Farlane Smith, a company from England. This was on 3 April 2003. However, when he was re-examined by the deputy public prosecutor later on 4 February 2004 he corrected himself and said that he obtained the pure standard methamphetamine from the research and development unit of Jabatan Kimia Malaysia. This is what he said in his evidence:

> I obtained the pure MTM standard from the research and development unit of Jabatan Kimia Malaysia.
>
> The source of the MTM standard came from the seized material. Seized material referred to the exhibit submitted by the police to the Narcotics Section for analysis.
>
> During cross examination you said you bought the pure MTM from the manufacturer. Can you explain?
>
> Most of the pure drug standards are purchased from Mc Farlane Smith, England. That was the reason why I said the MTM standard was also purchased from Mc Farlane Smith. Then I was asked to produce the manufacturer's certificate. On checking I realised that Mc Farlane Smith does not sell this particular MTM standard.
>
> On further checking I realised that the Research & Development Unit of Jabatan Kimia, Petaling Jaya Malaysia had purefied a small quantity of MTM for the quantification of MTM in this particular case.
>
> The manner in which the homogenisation process was carried out had been studied by the narcotics section of Jabatan Kimia, Petaling Jaya. By blending the crystalline substance for about (5) minutes using a commercial food blender is sufficient to homogenize the crystalline substance.

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How can you tell the GC machine is in good working order?

The GC machine is calibrated using the pure MTM standard. The calibration was done before the actual analysis of the MTM of interest ie the off-while (Sic) crystalline substance.

[29] Having carefully considered the evidence of PW5 we come to the conclusion that there was no basis for the appellant to complain on the analysis carried out by the chemist on the said drugs and his conclusion on the said analysis. The pure standard methamphetamine used by him was prepared by the Jabatan Kimia Malaysia itself and not from the supplier. As such there was no necessity for PW5 to carry out an independent test to find out whether the pure standard methamphetamine he used in the analysis was actually pure or not. We are satisfied that the chemist had followed proper procedures in analysing the said drugs.

[30] The learned trial judge had considered the evidence both for the prosecution and for the defence very carefully. He gave his reasons why he accepted some and rejected others. We see no reason to disturb his findings especially when he had the advantage of seeing and hearing the witnesses. Accordingly, we dismissed this appeal and affirm the appellant's conviction and the sentence of death passed on him.

Appeal dismissed.

Reported by Mashrifah Ravendran